

# **Exhibit F**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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In the matter of the application

for Instagram Account

CUAPARTHEIDDIVEST

Telephone Conference

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New York, N.Y.  
January 25, 2025  
2:00 p.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

MATTHEW D. PODOLSKY  
Acting United States Attorney for the  
Southern District of New York

LAUREN PHILLIPS

ALEC WARD

PAIGE FITZGERALD

Assistant United States Attorneys

Also Present:

[REDACTED]

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1 (Case called)

2 THE COURT: Can I get the appearances on behalf of the  
3 government, please?

4 MR. WARD: Good afternoon, your Honor. Alec Ward, for  
5 the government. Joining me on the line are Principal Deputy  
6 Chief for the Civil Rights Division Criminal Section, Paige  
7 Fitzgerald, and Assistant U.S. Attorney Lauren Phillips from  
8 the Southern District of New York.

9 THE COURT: Okay.

10 [REDACTED] Good afternoon, your Honor. This is [REDACTED]  
11 [REDACTED], with the FBI.

12 THE COURT: Ah. Thank you.

13 Is the reporter on the line?

14 (Pause)

15 THE COURT: Okay. Thank you.

16 At the outset, we had a conference yesterday. I  
17 failed to note that the transcript of the conference should be  
18 sealed because it relates to a warrant application.

19 Similarly, the transcript of today's proceeding should  
20 also be sealed because it relates to a warrant.

21 So I have reviewed the materials that were submitted  
22 to me yesterday or, rather, on last Thursday evening, and which  
23 were the subject of yesterday's conference. And I have  
24 received the materials today.

25 The cover email indicates that there were some changes

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1 in the materials.

2 So, could the government explain to me what the  
3 changes in the materials are?

4 MR. WARD: Yes, your Honor. Alec Ward.

5 Pursuant to the questions posed by the Court  
6 yesterday, the change to the substance of the warrant portion  
7 of our submission is confined to adding a paragraph to the  
8 warrant and nondisclosure order, specifying that at the time  
9 records are provided to the government by Meta, the warrant  
10 recipient, those records should be returned to the criminal  
11 duty magistrate on duty at the time of receipt.

12 Except for that, the submission you have before you –  
13 and of course changing the Court's signatories, signature  
14 block – is identical to that attached as Exhibit 2 to our  
15 letter of March 20th.

16 We have made some discoveries in response to the  
17 Court's inquiries yesterday about the posture of this matter  
18 that change the nature of what we need to request at this  
19 point, and I'm happy to address that as well.

20 We're also prepared to address the address of the  
21 requested nondisclosure order.

22 I can do that in whatever order the Court prefers.

23 THE COURT: Go ahead. So, what's the change in terms  
24 of procedural posture?

25 MR. WARD: We, in our letter of March 20th, had been

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1 under the belief that a formal oral order had been issued to  
2 the representative from the Southern District of New York, who  
3 was kind enough to deliver our original application to the  
4 magistrate for us.

5 In attempting to locate a sworn record in response to  
6 your Honor's inquiries of yesterday, we discovered that the  
7 affiant was never placed under oath, and, accordingly, no  
8 formal oral order was issued. What appears to have happened is  
9 that the application was forwarded to the duty magistrate for  
10 review. The duty magistrate came back to our hosts at the U.S.  
11 Attorney's Office with some questions. Those were addressed in  
12 the supplemental application submission, and then the duty  
13 magistrate, Magistrate Netburn phoned, again, the host AUSA,  
14 who was at that point just acting as an intermediary, and said  
15 that, based on her review of the warrant -- she advised, on an  
16 informal basis, that she was not going to sign it.

17 No hearing was held where our affiant, [REDACTED], was  
18 placed under oath. There is, therefore, no formal oral order  
19 denying the warrant for this Court to review. And,  
20 accordingly, we think, I think, need to withdraw our request  
21 for review under the Federal Magistrates Act, under Section  
22 636, because there is no order in place for this Court to  
23 review.

24 Procedurally, today, I think our thought would be, we  
25 have everyone here, including our affiant, and we are prepared

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1 to present the warrant again to this Court for a probable-cause  
2 ruling of first impression. On the other hand, we want to be  
3 deferential and respectful to this Court's ordinary protocols,  
4 and we understand that the normal practice in this court would  
5 be to seek a formal order from a magistrate.

6 So, although we're prepared to proceed with  
7 presentation of the warrant to your Honor today, we defer to  
8 your Honor's sound discretion as to procedurally how this ought  
9 to be handled.

10 That said, we think, based on our conversations with  
11 the Southern District, we would follow their practice of  
12 returning the warrant application to the magistrate who has  
13 already reviewed it, which would be Judge Netburn. I think we  
14 know what her order would be, and we would likely end up back  
15 in front of your Honor in fairly short order on the same  
16 posture. As a prudential matter of not wasting judicial  
17 resources and time, we're more than prepared to proceed with  
18 submission of the warrant today.

19 THE COURT: All right. Well, that's very forthcoming.

20 Plainly, it is an unusual situation, and we should  
21 follow the normal procedure. So, you tell me that there has  
22 been no formal decision by the magistrate judge rejecting the  
23 warrant. I assume, also, that you've never presented to the  
24 magistrate judge the memo that you had presented to me, the  
25 20-page memo, or so, explaining why you concluded that, in

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1 fact, there was probable cause, and that there was no justified  
2 First Amendment objection to issuing the warrant.

3 Is that right?

4 MR. WARD: That is correct, your Honor. The March 15  
5 and 16 locations that were attached respectively as Exhibits 2  
6 and 1 to our letter of March 20th to your Honor have been  
7 presented to the magistrate judge, but the cover letter  
8 addressed to your Honor requesting review and the associated  
9 legal arguments therein have not been presented to the  
10 magistrate.

11 THE COURT: It would seem to me that the better  
12 practice would be to present all of those materials to the  
13 magistrate judge, including your memo, so that the magistrate  
14 judge would have the opportunity, in the first instance, to  
15 make the decision. And if the magistrate judge decides that  
16 you failed to persuade her, then you could take the normal  
17 appeal to the district court judge.

18 And, in fairness, I would think that this would go  
19 again to Magistrate Judge Netburn, and even though I'm not  
20 sitting in Part I anymore, again, in fairness, since I've gone  
21 over these papers, any appeal would be taken to me as a  
22 continuation of what I did or what I've been asked to do. So,  
23 I appreciate the fact that you've been forthcoming.

24 I have one other question for you, which was the issue  
25 of the one year or the 90 days.

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1 MR. WARD: Yes, your Honor.

2 THE COURT: I've reviewed the memos, the Department of  
3 Justice memos, and the basis for the one year is 2705(b), which  
4 doesn't specifically include a time limit. So, the Department  
5 of Justice says: Okay, one year. 2705(b) refers to  
6 2703(b)(1). 2705(a) does include a 90-day limit, and the  
7 Department of Justice memo says, of course, an application  
8 under 2705(b) has a limit of one year as a matter of prudence,  
9 from the Department of Justice.

10 How do you distinguish 2705(a)? What situations arise  
11 under 2705(a) with the 90-day limit rather than 2705(b), which  
12 doesn't include a time limit?

13 MR. WARD: I had to research this myself last night,  
14 your Honor, and if you'll indulge me in a little bit of  
15 explanation, I've consulted with some of my colleagues who are  
16 more knowledgeable, and I think I've wrapped my head around  
17 this.

18 The Stored Communications Act, in 2703, provides for  
19 three different forms of legal process whereby the government  
20 can request or can demand information from a regulated  
21 provider – subpoenas, ordinary Federal Rules of procedure  
22 search warrant, and an intermediate form of process, which the  
23 statute refers to as the court order; the Department calls them  
24 2303(d) orders because that's the section that provides for  
25 them, if there's an intermediate form of process whereby the



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1 standard is lower than probable cause but a court order is  
2 still required and it allows the Department to demand more  
3 information than we could with a subpoena but less than with a  
4 search warrant.

5           Neither of those forms of process are at issue here.  
6 We have opted to pursue the search warrant avenue, but the  
7 statute permits the government to demand what the statute calls  
8 content records with either a subpoena or a 2703(d) order. The  
9 department does not, as a matter of prudence and internal  
10 policy, do that, but if it did, the statute requires that the  
11 government itself, as opposed to the provider, give notice to  
12 the person whose information is being sought. That notice,  
13 which comes from the government, as opposed to the computing  
14 service provider, may be delayed under 2705(a)(1)(A) for what  
15 the statute calls a court order. That's the 2703(d)  
16 intermediate order and (a)(1)(b), where it's a subpoena.

17           2703(b) specifies that where the government opts to  
18 pursue the judicial search warrant procedure, the government  
19 need not provide any notice to the person whose information is  
20 sought from the regulated provider. However, 2703 on its face  
21 does not prohibit the provider from giving its customer notice  
22 that it is providing information in connection with a search  
23 warrant. 2705(b) provides for what's called a preclusion order  
24 whereby the government can seek a court order precluding the  
25 provider from notifying its own customer of the warrant, and

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1 that's what's sought here. And that does not have the 90-day  
2 limitation on the period of delay.

3 THE COURT: Okay. So, this is the direction to Meta  
4 not to notify for one year.

5 Is there any provision under the warrant that requires  
6 the government to notify the ultimate owner of the records  
7 possessed by Meta?

8 MR. WARD: No, your Honor. And I would point the  
9 Court to Section 2703(b)(1)(A), which states specifically that,  
10 without required notice to the subscriber or customer, if the  
11 governmental entity obtained the warrant issued using the  
12 procedures described in the Federal Rules of Criminal  
13 Procedure --

14 THE COURT: Okay. Hold on one second.

15 Okay. Thank you.

16 Who is the Southern District assistant on the call?

17 MR. WARD: AUSA Lauren Phillips.

18 THE COURT: Okay.

19 So, Ms. Phillips, our regular procedure is that the  
20 magistrate judge should be afforded, in the first instance, the  
21 opportunity to either sign the warrant or decline to sign the  
22 warrant. And if the magistrate judge declines to sign the  
23 warrant, then there would effectively be a de novo appeal to  
24 me.

25 Is that right?

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1 MR. WARD: Alec Ward again, your Honor.

2 The appeal to your Honor is not de novo at that point.  
3 It's the form of review provided for by Section 636, which your  
4 Honor may be more familiar with in the context of Civil Rule 72  
5 or Criminal Rule 59. It's clear-error review on findings of  
6 fact and contrary-to-law review on legal reasoning and  
7 conclusions of law.

8 THE COURT: Okay.

9 Ms. Phillips, is all of that correct?

10 Are you still there?

11 MS. PHILLIPS: Your Honor, I'm not sure if I'm in a  
12 position to weigh in on that. Our role is pretty limited to  
13 walking through the warrant.

14 THE COURT: Okay.

15 Well, the government has been forthcoming. I don't  
16 want to go through an unnecessary procedure.

17 On the other hand, the government tells me that the  
18 magistrate judge doesn't appear to have had a final opportunity  
19 to say no on the warrant, and certainly hasn't reviewed the  
20 memo that the government prepared with respect to the warrant.  
21 Again, I don't want to have to go through an unnecessary step;  
22 on the other hand, I don't want to preclude the magistrate  
23 judge from having the opportunity to make the decision.

24 So --

25 MR. WARD: Alec Ward, again, your Honor. I apologize.

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1 I just want to be very clear on the factual record  
2 here. There's no question that the magistrate declined to sign  
3 the warrant. It may be a very technical point, but what did  
4 not happen was the magistrate judge receiving a sworn  
5 declaration or testimony from an affiant on the record and  
6 issuing a formal oral order basically declining the  
7 government's, in effect, motion. She indicated that if  
8 presented with the contents of the warrant that she was  
9 presented and did read, she would deny the government's  
10 application.

11 So, we do know – it's, I understand, a technical  
12 point – we do know the merits point on the face of the second  
13 warrant, but we do not have a formal oral order after receiving  
14 sworn evidence.

15 Our position is, the reason it matters is because if  
16 your Honor is to consider the warrant, the posture does change  
17 the standard of review. If you hear the warrant in the absence  
18 of a formal order from the magistrate, you're hearing  
19 essentially it as a matter of first impression on the probable  
20 cause standard; whereas, if you're reviewing a magistrate's  
21 order, that's in the more deferential – I'll call it, a  
22 quasi-Rule 59 – posture with regard to findings of fact.

23 We defer to you on which of those you feel is more  
24 prudent because it does affect the standard of review.

25 THE COURT: Again, I think you're being very

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1     forthcoming.

2             It's important that proper procedures be followed, and  
3     the proper procedure would be for the magistrate judge to make  
4     the decision in the first instance. And there's at least an  
5     argument that the magistrate judge hasn't done that, even  
6     though you believe that the magistrate judge's decision would  
7     be to deny the warrant. And you say it would change the  
8     standard of review for me, and I certainly assumed that the  
9     magistrate judge had, in fact, made the final decision in  
10    rejecting the warrant.

11            You can make it perfectly clear to the magistrate  
12    judge that it was unclear whether, faced with a full record, if  
13    you will, the magistrate judge had decided to deny the warrant,  
14    and, if so, then it would come to me. That would appear to be  
15    the most prudent way to proceed. I don't want to cause any  
16    unnecessary procedures. On the other hand, I certainly don't  
17    want to circumvent what would be the normal procedure.

18            You're also faced with an issue, which I leave to you:  
19    There's an unsworn affidavit. Normally, the affidavit gets  
20    signed before or, under the rules, remotely before the judicial  
21    officer from whom the relief is being sought. So you would  
22    normally take that to the magistrate judge for the agent to  
23    swear the affidavit before the magistrate judge or remotely  
24    before the magistrate judge, rather than bringing a signed  
25    affidavit to the magistrate judge or the district court judge.

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1           So, what you will end up doing, I assume, is  
2     presenting the package to the magistrate judge and explaining,  
3     because it wasn't clear, that the magistrate judge had in fact  
4     determined to deny the warrant, you want to present the  
5     package, including, I assume, the memo that you otherwise  
6     presented to me for the first time, have the agent sign, either  
7     personally or remotely, before the magistrate judge, the  
8     affidavit, and have a determination from the magistrate judge,  
9     whether the magistrate judge is denying the warrant or not.

10           Perhaps the magistrate judge would be convinced by the  
11     memo that you prepared, that was never presented to the  
12     magistrate judge. So, I don't mean to imply any decision on my  
13     part, because I agree implicitly with what you said earlier,  
14     which is there should be a decision, clear decision, by the  
15     magistrate judge, whether the magistrate judge is signing or  
16     not signing the warrant.

17           And I hope that's clear because I don't want to  
18     misrepresent it in any way to the magistrate judge. I'm not  
19     suggesting you would deliberately do that, but I'm simply  
20     trying to follow what I understand the regular practice is,  
21     which is to make sure that you have a decision from the  
22     magistrate judge based on all of the relevant information – the  
23     affidavit by the agent, the memo that you've prepared – to get  
24     a decision from the magistrate judge, which, if necessary,  
25     would then be reviewed by the district court judge, without

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1 attempting to suggest what the district court judge would do.

2 MR. WARD: I think that's entirely sensible, your  
3 Honor. And I appreciate the Court's care and thoughtfulness on  
4 this issue and, again, regret the factual conclusion.

5 I think, out of candor, what I will be inclined to  
6 represent to the magistrate is that, on review of the record,  
7 such that it is, the government concluded, and your Honor  
8 agreed, that the record wasn't sufficiently clear, as it stood,  
9 for this Court to be confident exercising the power of review  
10 under the review standard, and we'll present the application  
11 again, we'll present the memorandum, and we'll ask for a clear  
12 on-the-record ruling, with the understanding that if it's  
13 adverse to the government, we'll return to your Honor for  
14 review.

15 THE COURT: Okay.

16 You need not explain what you would do in the case of  
17 whatever the magistrate judge does. I assume you would  
18 carefully --

19 MR. WARD: Understood, your Honor.

20 THE COURT: -- carefully consider whatever the  
21 magistrate judge does, and you would consider the next step.

22 And we've made a record of this conference, and you're  
23 certainly welcome to show the transcript, if you will, to the  
24 magistrate judge. The transcript here will be sealed, but you  
25 can get it from the court reporter, and it's certainly open to

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1 the lawyers for the government and certainly open to the  
2 magistrate judge.

3 MR. WARD: Thank you, your Honor.

4 THE COURT: Okay.

5 I think that's it for me today. Is that right?

6 MR. WARD: I think so, your Honor. I don't have  
7 anything further for the government at this time.

8 THE COURT: Okay. Well, thank you. Again, I  
9 appreciate your candor. Thank you. Great.

10 MS. PHILLIPS: Thank you, your Honor.

11 THE COURT: Bye now.

12 MR. WARD: Good afternoon, your Honor.

13 THE COURT: Bye.

14 (Adjourned)  
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